

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DUKE UNIVERSITY
Employer

and

Case 10-RC-187957

SERVICE EMPLOYEES INTERNATIONAL
UNION, CLC/CTW
Petitioner

ORDER

The Employer's request to stay the mailing of the ballots is denied as moot, as the ballots have already been mailed and the ballot count is currently scheduled for February 24, 2017. The Employer's request for expedited consideration is hereby granted. The Employer's request for review, and its request to stay the counting of the ballots and to impound is granted in part and denied in part. The voters enfranchised solely due to the eligibility formula's look-back period (i.e., those voters not holding a unit position during the Spring 2017 semester, but having held a unit position during the Spring 2016 or Fall 2016 semesters) shall vote subject to challenge and their ballots shall be segregated and impounded. If the Regional Director is unable to ascertain which of the mail ballots were cast by employees enfranchised solely due to the eligibility formula's look-back period, then all of the ballots shall be impounded and the Employer shall promptly produce a list of such employees. Should the number of such challenged voters prove determinative, their eligibility will be determined following a hearing on the propriety of the eligibility formula.¹

PHILIP A. MISCIMARRA, ACTING CHAIRMAN

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., February 23, 2017

¹ Given that the Board has not passed on the appropriate eligibility formula for graduate student employee representation elections following its decision in *Columbia University*, 346 NLRB No. 90 (2016), the Employer should have been allowed to litigate the propriety of the Petitioner's proposed eligibility formula at the pre-election

hearing, and the Region erred by refusing to permit it from doing so. As we have directed the segregation and impoundment of the ballots cast by voters enfranchised solely due to the disputed portion of the eligibility formula, however—and as the Employer has not asserted that its preferred eligibility formula would enfranchise employees not eligible under the formula directed by the Regional Director—we find that any prejudice the Region’s actions may have caused the Employer may be remedied through post-election litigation, if not rendered moot by the tally of unchallenged ballots.

In denying review, we also find it unnecessary to pass on the Regional Director’s alleged reliance on certain affidavits that the Petitioner submitted to the Region before the hearing opened. We independently determine that the Regional Director did not abuse his discretion in directing a mail ballot election under *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998), given the undisputed evidence of the voters’ scattered schedules, the ability of the voters to read and understand the mail ballots, and the inefficiency of using Board resources to run a manual election in at least five locations over the course of two 14.5 hour days (as the Employer proposed).

Acting Chairman Miscimarra would grant the Employer’s request for expedited review, a stay of the election, or impoundment of the ballots in part for the reasons expressed above by the Board majority, and for the reasons stated in his dissenting opinion in *Columbia University*, 364 NLRB No. 90, slip op. at 22-34 (2016) (Member Miscimarra, dissenting). Additionally, Acting Chairman Miscimarra believes substantial questions are raised regarding the appropriateness of the Regional Director’s use of a mail ballot election, since the Board adheres to a rule that favors manual elections, and the facts suggest that a manual election would have reasonably permitted participation by eligible voters. This case involves application of the Board’s Election Rule, with which Acting Chairman Miscimarra continues to disagree for the reasons that he and former Member Johnson stated in their dissenting views regarding the Rule. See 79 Fed. Reg. 74308, at 174430-74460 (December 15, 2014) (dissenting views of Member Miscimarra and Member Johnson).